No. 49088-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

CHARLES JOHNSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF MASON COUNTY

BRIEF OF APPELLANT

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ISSUES PERTAINING TO ASSSIGNMENT OF ERROR

A. Was Mr. Johnson unlawfully arrested for criminal trespass, where there was no factual basis to support the arresting officers' belief he was trespassing?

B. Following his arrest, a search revealed that he was carrying methamphetamine. Should this evidence have been suppressed?

C. Should this Court deny any future requests for appellate costs where Mr. Johnson has previously been found indigent, and homeless, and there is no evidence of a change in his financial circumstances?

II. STATEMENT OF FACTS

1. Procedural History

The Mason County prosecutor charged Charles Johnson by information with one count of possession of a controlled substance, methamphetamine. CP 88-89. The information was later amended to include two counts of bail jumping. CP 68-70. Mr. Johnson filed a motion to suppress evidence because there was no reasonable

and articulable suspicion of criminal activity justifying the officer's stop of Mr. Johnson. CP 83-85.

2. Suppression Hearing

On Christmas night, 2015, around 9:55pm, Mr. Johnson walked near, but not on, a sidewalk on the south side of the Community Credit Union in Shelton, Washington. Vol. 1RP 30. No gate, fence or chain blocked the entrance to the gravel walkway. Vol. 1RP 30-31. There were no signs at the entrance of the walkway indicating it was a no trespassing zone. Vol. 1 RP 31.

On the chain link fence surrounding the high voltage power substation of the Bonneville Power Administration[1] (BPA) there was a Private Property- No Trespassing sign some distance from where he was walking. Vol. 1RP 27;40. (Def. Exh. 5).

Several feet to the left of where Mr. Johnson was on the walkway there was a No Trespassing sign attached to a BPA tower. Several feet to the right of the walkway a no trespassing sign was attached to the chain link fence closest to the tower. Vol. 1RP 26. (Defense Exh. 8,9,10). The chain link fence enclosed all the BPA

[1] BPA is a nonprofit federal power marketing administration based in the Pacific Northwest. www.bpa.gov

transfer equipment. The signs were not reflective or directly lit. Vol. 1RP 29.(Def. Exh, 2-10).

Shelton police officer Robert Auderer pulled his patrol car to a stop when he noticed Mr. Johnson leaving the gravel road area. He contacted Mr. Johnson. Vol. 1 RP 11; 22. The officer guessed that Mr. Johnson might have been coming from an illegal homeless campsite[2], but did not ask him where he was going or where he had been. Vol. 1RP 11-12;20.

Although Mr. Johnson was never within any fenced area of the BPA site and had not climbed on the tower, the officer "advised him he was trespassing." Vol. 1RP 11-12;38. Other than the fenced area of the substation, the officer testified the surrounding area was unimproved land. Vol. 1RP 39. (Def. Exh. 8).

Mr. Johnson identified himself and gave his birth date to the officer. Vol. 1 RP 12. The officer observed he appeared to exhibit behavior of someone under the influence of methamphetamines. The officer placed Mr. Johnson in handcuffs. Vol. 1RP 15-16.

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[2] Despite no confirming evidence, the officer testified that BPA had written to the Shelton Police asking them to stop trespassers from using their property because homeless individuals had set up encampments on it. Vol. 1RP 9-10.

The officer initially testified as he stood next to Mr. Johnson, he saw "one of his cargo pockets was hanging open" and he was able to see, from looking straight down, that there was a baggie of methamphetamines in his pocket.

However, he later admitted that after he handcuffed him, he frisked Mr. Johnson for weapons and it was possible that he had patted down all the pockets of Mr. Johnson's pants. Vol. 1RP 33. He agreed that the frisk may have been vigorous enough to manipulate Mr. Johnson's cargo pant Velcro pocket open. He used his flashlight to look inside the pocket. Vol. 1RP 33-34. Inside the pocket he saw what he suspected was a baggie of methamphetamine. Vol. 1RP 37. He said he told Mr. Johnson, "I see the meth in your pocket." 1RP 16.

Although Mr. Johnson was never within the fenced area of the substation or any fenced area of the property of BPA, the officer nevertheless arrested him for trespass. Vol. 1RP 18;38. In a search incident to arrest the officer removed the baggie from Mr. Johnson's pocket. Vol. 1RP 37. He advised Mr. Johnson of his Miranda rights and asked him what was in the baggie. Vol. 1RP 18-19. Mr. Johnson said he did not know, he had just picked it up from the trail he had been walking. Vol. 1RP 19.

Despite testimony and exhibits demonstrating that with the exception of the gravel walkway the unfenced area was unimproved, the 'no trespass signs' were unlit, and there was no barrier to the entry to the gravel road, the court found the officer had reasonable grounds to believe Mr. Johnson had notice he was trespassing. The court denied the motion to suppress the evidence. Vol. 1RP 56. The court entered written findings of fact and conclusions of law. CP 112-115. Mr. Johnson was not charged with criminal trespass.

The matter proceeded to a jury trial. The officer testified that over the years he had stopped students, people walking their dogs, people cutting through to the Fred Meyer Store, and homeless individuals from walking through or on the unfenced property. Vol. 2RP 130. The officer believed the police department had been sent a "form letter saying anybody on the land can be arrested for trespassing…" 2RP 131.

In contrast to his testimony at the CrR 3.6 hearing, at trial the officer testified he did *not* manipulate the pocket to Mr. Johnson's pants, but rather, that it was "draped" open and he *probably* used his flashlight to peer inside and see the baggie containing a white substance. Vol. 2RP 132. (Emphasis added). The analyst from

the Washington State Patrol Crime Lab testified the substance found in the baggie was methamphetamine. Vol. 2RP 141.

Mr. Johnson was found guilty on all counts and granted a residential DOSA sentence. CP 13;17. He makes this timely appeal. CP 5-6;9.

III. ARGUMENT

The Trial Court Erred When It Denied Mr. Johnson's Motion To Suppress Evidence That Was Illegally Seized.

In reviewing the denial of a motion to suppress, the appellate court must determine whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. This Court reviews de novo the trial court's conclusions of law pertaining to the suppression of evidence. *State v. Garvin,* 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Mr. Johnson argues that because the police officer lacked probable cause to arrest him, the trial court should have suppressed the methamphetamine seized in the search incident to

the arrest. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081(1961).

Under the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington Constitution, warrantless arrests must be supported by probable cause. "Probable cause is the objective standard by which the reasonableness of an arrest is measured." *State v. Huff,* 64 Wn.App. 641, 646, 826 P.2d 698 (1992). Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. *Id.* It is axiomatic that "an arrest not supported by probable cause is not made lawful by an officer's subjective belief that an offense has been committed." *Carroll v. United States,* 267 U.S. 132, 161-62, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Under RCW 10.31.100(1), "any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor…involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person."

"A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080(1).

A person "enters or remains unlawfully in or upon premises when he is not licensed, invited, or otherwise privileged to so enter or remain." "A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner." RCW 9A.52.010(2). Under the statute, unlawful entry requires evidence of either fencing or conspicuous signage.

The court entered Finding of Fact 2:

> Officer Robert Auderer observed a male, later identified as Charles Johnson, standing between *two clearly visible no trespassing signs* on an improved gravel road owned by Bonneville Power Access Road. The no trespassing signs where (sic) located on a fenced in area with electrical equipment and unfenced electrical towers. Officer Robert Auderer knew that the location belonged to Bonneville Power and the (sic) Bonneville Power had requested that trespassers and illegal campers be removed from the

> property. Officer Robert Auderer also knew that the access road was a point of entry for illegal campers on to Bonneville Power property.

CP 112-13. (Emphasis added).

The No Trespassing Signs Were Not Clearly Visible And Did Not Indicate A Citizen Could Not Walk On The Gravel Area.

Officer Auderer testified it was close to 10 p.m. on Christmas night. Vol. 1RP 11. He testified the no trespassing signs that were closest to Mr. Johnson were unlit and not made out of reflective material. Vol. 1RP 29-30. The signs were not clearly visible at night.

However, even if the signs had been visible, their placement was less than informative as to what was prohibited. One sign was attached to a large tower and the other was attached to a chain link fence that cordoned off the area that held other towers and power substations. (Exh. 8,9). The question is whether Mr. Johnson, or anyone else, would understand the signs prohibited access to areas other than the tower and the cordoned off area.

In *State v. Johnson,* 75 Wn.App. 692, 879 P.2d 984 (1994), DEA agents entered onto Johnson's property to search for a marijuana grow operation. *Id.* at 704-05. The property was

protected by a fence, a gate and signs near the gate saying "No Trespassing" and "Private Property". *Id.* The Court held that the agents wrongly entered the area finding that "no trespassing" signs are one factor to be considered but in conjunction with other manifestations of privacy, such as a closed gate or fence. The existence of a no trespassing sign is not dispositive of the establishment of privacy. *Id.* at 705. The Court concluded that the agents entered an access road that was *not* impliedly open because of all the other indicia of prohibition to entry. *Id.* at 706.

Here, the road *was* impliedly open. Officer Auderer testified there was no gate, no fence or chain blocking access to the gravel road. There was no sign on the road prohibiting entrance. Vol. 1RP 31. He specifically testified that other individuals, including homeless people, students heading to the nearby schools, people walking their dogs and people taking a shortcut to Fred Meyer[3] used the gravel road. Vol. 2RP 130. The officer conceded that "in a perfect world that would be great" to put a gate across the roadway to signal an intent for privacy. Vol. 1RP 35-36.

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[3] Officer Auderer was not asked how many students, dog walkers, or shoppers he had arrested for criminal trespass.

The signage that was on the tower and the chain link fence did not inform average citizens that they were entering private property and not allowed to walk along the gravel road. The area was unfenced and surrounded by unimproved land containing bushes and weeds. (Def. Exh. 3,4,8).

The record does not support the court's finding that the two signs were clearly visible. Nor does the record support the implication that the signs informed individuals they were prohibited from walking the gravel road. Rather, it supports the idea that the signs prohibited entry onto the tower and the fenced off area that held BPA equipment.

Here, the facts and circumstances known to the arresting officer were insufficient to cause a person of reasonable caution to believe that Mr. Johnson was committing a crime. While the officer knew that BPA owned the property, he also knew that over the years he had encountered a large variety of individuals who accessed the gravel walkway, like Mr. Johnson, with no knowledge that they might be considered to be trespassing. He also knew there was nothing prohibiting entrance to the property. He also knew that Mr. Johnson had not gone within the fenced and signed area of any of the BPA property. Vol. 1 RP 38. The facts as

known to the officer would not cause a reasonably cautious officer to conclude that Mr. Johnson was trespassing. The trial court's findings do not support the conclusion the officer had probable cause to arrest him. The arrest violated both the federal and state constitutions. The court erred when it concluded the ensuing search was lawful.

A lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." *State v. O'Neill,* 148 Wn.2d 564, 585, 62 P.3d 489 (2003)(citations omitted). Where Article 1§7 of the Washington Constitution has been violated by an unlawful arrest, the remedy must follows: exclusion of the ill-gotten evidence. *State v. Eserjose,* 171 Wn.2d 907, 913, 259 P.3d 172 (2011). The exclusionary rule "is intended to protect individual privacy against unreasonable governmental intrusion, to deter police from acting unlawfully, and to preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means." *Id.*

Here, because the arrest and search of Mr. Johnson violated both the Fourth Amendment and Article I §7, the evidence gathered during the search is inadmissible. *State v. Duncan,* 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence of the methamphetamine

found his pant pocket must be suppressed. *State v. Valdez,* 167 Wn.2d 761, 778, 224 P.3d 751 (2009).

B. Any Future Request for Appellate Costs Should Be Denied.

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. A commissioner or clerk of the appellate court must award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. RAP 14.2.

In *State v. Sinclair,* the Court of Appeals concluded that where the issue of appellate costs in a criminal case is raised in the appellant's brief or on a motion for reconsideration, it is appropriate for the reviewing Court to exercise its discretion and consider it. *State v. Sinclair,* 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The *Sinclair* Court reasoned that exercising discretion meant inquiring into a defendant's ability or inability to pay appellate costs. *Sinclair,* 192 Wn.App. at 392. If a defendant is indigent and lacks the ability to pay, an appellate court should deny an award of costs to the State. *Sinclair,* 192 Wn.App. at 382.

The costs of appeal are added to the fees imposed by the trial court. The Washington Supreme Court recognized the widespread "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court involvement, which inhibits re-entry into the community and increases the chance of recidivism. *State v. Blazina,* 182 Wn.2d 827, 836, 344 P.3d 680 (2016).

In *Sinclair,* the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair,* 192 Wn.App. at 392. Here, Mr. Johnson already owes $4,414.67 in legal financial obligations. (CP 95). The trial court found he had some resources in terms of a small monthly pension of $300. Vol. 2RP 212; CP 8. However, Mr. Johnson owns no property, has no assets, is homeless and has debt of over $14,000 not including the previously court ordered fines. CP 8.

Mr. Johnson was found indigent and entitled to appellate review at public expense. CP 3-4. Under *Sinclair* and RAP 15.2(f), this Court should presume that he remains indigent:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

There is little evidence that Mr. Johnson will have the ability to repay additional appellate costs : no evidence has been presented to this court, and there is no finding by the trial court that Mr. Johnson's financial situation has improved. Mr. Johnson respectfully asks this Court to decline to impose any appellate costs that the State may request.

IV. CONCLUSION

The facts and authorities in this case require reversal of the ruling denying Mr. Johnson's motion to suppress evidence obtained through his unlawful arrest. As there is no evidence to support his conviction for possession of a controlled substance, the conviction should be reversed.

Dated this 5th day of December 2016.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Charles Johnson, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on December 5, 2016 to:

Charles Johnson
c/o Marie Trombley

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Mason County Prosecuting Attorney (at timw@co.mason.wa.us).

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